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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 358

JERRY E. COLLINS,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondent in Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 858

JERRY E. COLLINS,
Petitioner,
vs.
SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondent in Opposition

OPINION BELOW

The opinion of the Court of Appeals below, reprinted as Appendix A to the Petition, has now been reported at 286 F2d 813.

GROUNDS OF JURISDICTION OF THIS COURT

Petitioner correctly states (Pet. 2) that the judgment of the United States Court of Appeals below was entered February 6, 1961, that there was no petition for a rehearing, and that this Court has jurisdiction under 28 USCA § 1254 (more precisely, § 1254(1)) and § 2101(c). Respondent emphatically disagrees with petitioner's statement that the question presented for review "has never been passed upon by this Court" (Pet. 2). To the contrary, the decision below follows the unanimous decision of this Court in *Atchison T. & S. F. R. Co. v. Scarlett*, 300 US 471 (1937, construing 45 USCA § 11, one of the sections invoked by petitioner, in a closely analogous situation and citing cases closely similar, factually, to the case at bar. Subsequent decisions have reaffirmed this holding of the *Scarlett* case, and we know of no case, including those cited by petitioner here and in the proceedings below, that has drawn this holding of *Scarlett* into question. (See pp. 7-9, 15-16 below.)

QUESTION PRESENTED FOR REVIEW

The abstract question presented for review is substantially as stated by petitioner (Pet. 2)—whether the presence of oil or grease on a grab iron of a railroad box car ladder constitutes a violation of provisions of the Federal Safety Appliance Act, 45 USCA §§ 4 and 11. In procedural context, the question presented is this: May a railroad employee recover damages from his employer under the Federal Employers' Liability Act (FELA), 45 USCA § 51, for injuries resulting from his slipping on grease on the grab iron, or rung, of a box car ladder even though judgment has been entered against him on a jury's verdict, based on all the evidence, that such injuries were not caused in whole or in part by any negligence of the defendant employer, and the employee has not raised any question on appeal which could affect the validity of that verdict?

STATUTES INVOLVED

The statutory provisions involved in this case are provisions of the Federal Safety Appliance Act, 45 USCA §§ 4 and 11 (reprinted as Appendix B of Petition) and the FELA, 45 USCA § 51 (reprinted in Appendix C of Petition). The Boiler Inspection Act, 45 USCA § 23 (also reprinted in Appendix C of Petition) applies only to locomotives and tenders and therefore has no application to this case, which involves a ladder on a box car, not a locomotive or tender. The Boiler Inspection Act, 45 USCA § 23, is discussed in the opinion below only because of petitioner's erroneous attempt to apply it to the facts of this case.

STATEMENT OF THE CASE

Petitioner, a railroad switchman, sued respondent, his employer, in a United States District Court under the FELA, 45 USCA § 51. The first count of the complaint alleges that the plaintiff was ascending a ladder of a box car near Third and Carroll Streets, San Francisco, when he slipped on grease on one of the grab irons of the ladder and fell to the ground and was injured. The first cause of action further alleges, as a legal conclusion, the theory now presented in the Petition for Certiorari, namely, "that said injuries were proximately caused because said defendant used and hauled in interstate commerce said car which was not provided with secure grab irons, contrary to the provisions of Sections 4 and 11 of said Safety Appliance Act" (R. 4). The second cause of action of the complaint incorporates *all* of the allegations of the first cause of action, and further alleges that the defendant "carelessly and negligently" failed to inspect the box car and failed to afford plaintiff a safe place to work and that plaintiff was injured "as a proximate result of said acts of negligence and carelessness" (R. 5).

The case came on regularly for jury trial on February 23, 1960 (R. 11). On February 24, 1960, after a hearing out of the presence of the jury, the district court granted respondent's motion to dismiss the first cause of action of the complaint, based solely upon alleged violation of the Safety Appliance Act, and ordered the trial to proceed as to the second cause of action, based upon negligence (R. 9-10, 17-24). At this hearing on the motion, petitioner's counsel, at the suggestion of the district judge, made a formal offer of his proposed proof in support of the first cause of action (R. 20-23), in which he stated that the involved box car had arrived from Portland, Oregon, two days earlier, had remained at the Bayshore Yards for nine hours, had then been taken to the vicinity of Third and Carroll Streets, where it was spotted on a track near some flour mills and remained spotted "30-odd hours" before the accident occurred. Counsel emphasized that "it was not an oil refinery, it was a flour mill" (R. 22). Apart from stating that there was "a film of oil" along the length of each rung of the ladder of the box car (R. 21), the offer of proof contained no statement of or reference to any defect whatsoever in any grab iron, ladder or other safety appliance on the car. Facts were stated tending to show that the oil on the ladder had emanated from journal boxes during the trip down from Portland, rather than from any other source (R. 22). All these facts were held by the district court, and indeed conceded by respondent's trial counsel, to present a question of negligence for the jury but not a case of violation of the Safety Appliance Act (R. 23-24).

The trial of the second cause of action, for negligence, consumed eight trial days, from February 23 to March 3, 1960, and ended with a jury verdict (necessarily unanimous) for respondent (R. 11). Thereafter, petitioner filed a timely notice of appeal which expressly limited the scope

of the appeal to the order dismissing the first cause of action (R. 14-15), thereby leaving the jury verdict and the judgment of the district court, insofar as based upon that verdict, final and conclusive upon the issues thereby decided, namely, that petitioner's injuries were not caused in whole or in part by any negligence on the part of respondent.

In affirming the judgment on February 6, 1961, the Court of Appeals relied not only upon *Ford v. New York, N. H. & H. R. Co.*, 54 F2d 342 (1931), and *Raudenbush v. Baltimore & O. R. Co.*, 160 F2d 363 (3 Cir. 1947) (as mentioned at Pet. 4), but also upon *Atchison T. & S. F. R. Co. v. Scarlett*, 300 US 471 (1937) (unanimous decision), which cited and approved the construction placed upon the Safety Appliance Act by the *Ford* case (holding grease on a grab iron not a Safety Appliance Act violation). Petitioner states (Pet. 4) that he "relies mainly upon the case of *Lilly v. Grand Trunk Western R. R.*, 317 US 481, 87 L.ed. 411 ('43) and on *Minehart v. Southern Pacific Co.*, 136 Cal. App. 2d 486, 288 P.2d 999 ('55) in support of his contention that grease on a grab iron constitutes a violation of said Safety Appliance Act." These two cases, upon which petitioner mainly relies, did not involve the Safety Appliance Act provisions invoked here, 45 USCA §§ 4, 11 (Pet., Appendix B), but construed and applied an entirely different statute, the Boiler Inspection Act, 45 USCA § 23 (Pet., Appendix C, ix). Unlike the Safety Appliance Act provisions, the Boiler Inspection Act does not apply to box cars and does not specify any safety appliances (such as grab irons, sill steps, running boards, etc.), but requires that *all* parts of *locomotives and tenders* be "in proper condition and safe to operate" and "have been inspected from time to time" in accordance with law, and be "able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for." (See pp. 13-18 below.)

ARGUMENT IN OPPOSITION TO CERTIORARI

I. Court of Appeals' Construction of Safety Appliance Act Is Supported by Scarlett Case in This Court and All Other Pertinent Decisions of Lower Federal and State Courts.

None of the reasons stated in Rule 19(1)(b) of the rules of this Court for granting review on writ of certiorari are present here. The decision of the Court of Appeals below is wholly in accord with this Court's decision in *Atchison T. & S. F. R. Co. v. Scarlett*, 300 US 471 (1937) and with all decisions of lower federal and state courts cited by petitioner or found by respondent at any stage of this case, and the decision below is not in conflict with any other such decision, applicable here, of this Court or of any lower federal or state court.

Section 4 (by virtue of section 8[1]) and section 11 (by virtue of section 16[2]) of 45 USCA, the Safety Appliance Act provisions invoked here, apply to *all* railroad cars, including locomotives and tenders. Essentially, as related to this case, section 4 provides that railroad cars in regular

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1. 45 USCA § 8 provides:
"The provisions and requirements of sections 1-7 of this title shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section 6 of this title, or which are used upon street railways."

2. 45 USCA § 16 provides:
"The provisions of sections 11-16 of this title, as to the equipment of cars with the designated safety appliances apply to every common carrier and every vehicle subject to what are commonly known as the "Safety Appliance Acts" set out in sections 1-10 of this title."

use be "provided with secure grab irons," and section 11 provides that all railroad cars in such use "requiring secure ladders * * * shall be equipped with such ladders" (Pet. App. B).

In *Atchison T. & S. F. R. Co. v. Scarlett*, 300 US 471 (1937) (unanimous decision), this Court held that the presence of matter foreign to a box car ladder (a safety appliance required by 45 USCA § 11) does not create, as to that ladder, a violation of the Safety Appliance Act. There the plaintiff, a railroad brakeman, fell to the ground while descending the ladder when his foot slipped on a round brace rod attached to the side of the box car immediately behind the ladder. He recovered a judgment in a California Superior Court based solely upon his contention that the presence of the brace rod behind the ladder rendered the ladder insecure in violation of 45 USCA § 11. It was conceded that the ladder itself complied with ICC specifications, including minimum clearance between the ladder and the brace rod. On appeal, the California Supreme Court affirmed, 7 C2d 181, 60 P2d 462, holding that the question of whether the ladder was secure within the meaning of the Safety Appliance Act had been properly submitted to the jury and declaring (7 C2d 194-195, 60 P2d 468):

> "It is obvious that the injection of a foreign article which is no part of an appliance would be as likely to render the appliance insecure as a direct defect in the appliance itself."

This Court reversed, declaring (300 US at 474-475):

> "We do not see how it reasonably can be said that the brace rod constitutes a part of the ladder. In itself, it was a contrivance separate and distinct from the ladder, designed and used for a purpose entirely apart from the use of that appliance. The right of recovery,

> if any, must, therefore, rest upon the effect of the near proximity of the ladder to the rod, neither being in itself defective. The law to be applied to that situation is the common-law rule of negligence, and not the inflexible rule of the Safety Appliance Act; and the questions to be answered are whether the two appliances were maintained in such relation to one another as to constitute negligence on the part of the company and, if so, whether Scarlett assumed the risk. Ford v. New York, N. H. & H. R. Co. (C.C.A. 2d) 54 F(2d) 342, supra; Chicago, R. I. & P. R. Co. v. Benson, 352 Ill. 195, 199, 185 N.E. 244; Slater v. Chicago St. P. M. & O. R. Co., 146 Minn. 390, 392, 393, 178 N.W. 813. In that view, Scarlett in abandoning his claim under the common-law rule of negligence abandoned the only possible ground of recovery."

Any doubt that *Scarlett* was a square holding *against* petitioner's present contention, that the presence of a foreign substance, grease or oil, on a grab iron gives rise to a violation of the Safety Appliance Act, is dispelled by an examination of the three cases cited in the above quotation from the *Scarlett* decision. *Slater v. Chicago St. P. M. & O. R. Co.*, 146 Minn. 390, 178 NW 813 (1920), held that there had been no violation of the Safety Appliance Act, for failure to equip a refrigerator car with a "secure running board," when the running board, on the top of the car, was obstructed by the temporarily displaced cover of a refrigerator bunker. In *Chicago, R. I. & P. R. Co. v. Benson*, 352 Ill. 195, 185 NE 244 (1933), the plaintiff switchman was injured when his glove became caught on a piece of fence wire, with a hook on the end, that had been wrapped around a grab iron of a freight car. Although holding the evidence sufficient to support a judgment against the railroad for negligence, the court held explicitly that there had been no violation of the Safety Appliance Act. "The wire which had

been placed [on the grabiron] by some person was no part of the grabiron." In *Ford v. New York, N. H. & H. R. Co.*, 54 F2d 342 (2 Cir. 1931), cert. den. 285 US 549, cited not only in *Scarlett* but also by the court below, the plaintiff employee fell and was injured while attempting to board a locomotive tender because of grease on the grab iron or handhold. He sued under both the Safety Appliance Act (45 USCA § 4) and the Boiler Inspection Act (45 USCA § 23), and his claim was rejected under both Acts. The holding that there had been no violation of the Boiler Inspection Act (questionable in view of later decisions under that Act) was not relevant to the *Scarlett* case (nor to the case at bar) because the Boiler Inspection Act does not apply to freight cars. The holding of the *Ford* case that the *Safety Appliance* Act (covering *all* railroad cars) had not been violated by grease on the grab iron *was* relevant to, and squarely approved by, this Court in *Scarlett*, and, of course, is squarely in point against petitioner's contention here.

As pointed out in the opinion below (Pet., App. A, iv), the United States Court of Appeals for the Third Circuit, decided, in *Raudenbush v. Baltimore & O. R. Co.*, 160 F2d 363 (1947), that ice or snow on the sill step of a gondola car did not constitute any violation of the railroad's duty, under the Safety Appliance Act, to equip the gondola car with "secure sill steps". The *Raudenbush* opinion (160 F2d at 366) cites *Ford v. New York, N. H. & H. R. Co.*, 54 F2d 342 (2 Cir. 1931), *supra*, and is in accordance with this Court's *Scarlett* decision.

In all of the cases, cited by petitioner, in which the Safety Appliance Act (as distinguished from the Boiler Inspection Act) has been held violated, the basis of the violation was

that a specific safety appliance was either *structurally* deficient or altogether *missing*. No violation was based on interference with the use of a perfectly sound appliance (such as the box car ladder here) by a foreign object or substance (such as grease or oil). In *Baltimore & O. R. Co. v. Jackson*, 353 US 325 (1957) (Pet. 10), the violations of the Safety Appliance Act arose from the complete *absence* of certain appliances: no power or train brakes on the motor track car and no automatic coupler or hand brake on the hand car which it was hauling. In *Shields v. Atlantic Coast Line R. Co.*, 350 US 318 (1956) (Pet. 10), the safety appliance, a dome running board on a tank car, broke beneath the weight of the plaintiff, causing him to fall. Obviously it was structurally defective. The series of three cases cited on page 5 of the petition all found violations of the Safety Appliance Act based on structural deficiencies in the safety appliance itself and not on the presence of any foreign matter: *Davis v. Reynolds*, 280 Fed. 363 (4 Cir. 1922), cert. den. 258 US 627 (sill step worn slick from use); *Knight v. Chicago & N.W. R. Co.*, 3 Ill. App. 2d 502, 123 NE2d 128 (1954) (wooden caboose step worn and rounded, its paint worn off and its edges smooth); *Edwards v. Southern Railway Co.*, 52 Ga. App. 557, 184 SE 370, 380 (1936) (complaint held sufficient, alleging that engine footboard "split, broken, jagged, rotten, slippery, uneven and unsafe").[3]

3. An analogous case, pointing out that to violate the Safety Appliance Act, a defect must be inherent in the appliance itself, is *Southern Pacific Co. v. Carson*, 169 F2d 734 (9 Cir. 1948). There the plaintiff was using a wooden club, inserted in the spokes of a hand brake wheel, to give him more leverage in tightening the hand brake; the club broke and plaintiff was injured. It was undisputed that the hand brake would not work efficiently without a brake club, and clubs were furnished to employees as standard operating equipment. The issue was whether the breaking of the club violated the requirement of the Safety Appliance Act (45 USCA § 11) that "all cars must be equipped with * * * efficient hand brakes." The court analyzed the issue in terms of whether the brake club con-

Petitioner argues from these last three cases that "if the slippery condition of said steps caused them to become unsafe and thus violated the Safety Appliance Acts, it is likewise true that the presence of grease or oil on a grab-iron causes said grabiron to become slippery and dangerous and unsafe, and, likewise, causes a violation of the Safety Appliance Act" (Pet. 5). This argument entirely ignores the crucial difference in operative scope between (1) the Safety Appliance Act provisions invoked here, 45 USCA §§ 4 and 11, and (2) statutes such as the Boiler Inspection Act, 45 USCA § 23. The Safety Appliance provisions do *not* impose an absolute duty (over and above the duty of care imposed by the FELA, 45 USCA § 51) to *maintain* grab irons, ladders, sill steps, running boards, etc., on non-locomotive railroad cars "in proper condition and safe to operate" (the language of the Boiler Inspection Act, 45 USCA § 23, Pet. App. C, ix). The extent of the absolute command of the Safety Appliance provisions is only that railroad cars be "provided with secure grab irons or handholds" (45 USCA § 4) and "equipped with secure sill steps * * * secure ladders and secure running boards" (45 USCA § 11). Obviously, to the extent that the grab irons, sill steps, ladders or running boards on a railroad car have been permitted to become *worn* loose or smooth or broken or otherwise *inherently* defective, such a car is no longer "provided" or "equipped" with the required safety appliances. These are deficiencies which normally result from wear and tear *through time* and therefore can be detected and remedied through periodic inspection and a repair and replacement program based on records of when the appliances were last

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stituted a part of the hand brake, and held that it did, thereby distinguishing *A.T. & S.F. Ry Co. v. Scarlett*, 300 US 471 (holding that a box car ladder was not rendered insecure by a brace rod back of the ladder, because the brace rod did *not* constitute part of the ladder, or infringe upon the clearance requirements imposed upon the ladder by ICC regulations).

installed or renewed. On the other hand, hazards resulting from the fortuitous imposition of an object or substance completely foreign to the safety appliance, such as oil or grease on a grab iron (this case and *Ford v. New York, N.H. & H.R. Co.*, 54 F2d 342 (2 Cir. 1931), cert: den., 285 US 549), snow or ice on a sill step (*Raudenbush v. Baltimore & O. R. Co.*, 160 F2d 363 (3 Cir. 1947)), a piece of fence wire wrapped around a grab iron (*Chicago, R.I. & P.R. Co. v. Benson*, 352 Ill. 195, 185 NE 244 (1933)), or a displaced ice bunker cover obstructing the running board on top of a refrigerator car (*Slater v. Chicago, St. P. M. & O. R. Co.*, 146 Minn. 390, 178 NW 813 (1920)), are not failures of the safety appliances themselves, but are simply among the many fortuitous railroading hazards against which the FELA, 45 USCA § 51, requires railroad carriers to exercise ordinary care. (See pp. 18-22 below).[4]

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4. The scope of the Safety Appliance Act in this connection was well pointed out by the court in *Slater v. Chicago, St. P. M. & O. Ry. Co.*, 146 Minn. 390 178 NW 813 (1920), cited in the text above:

> "• • • This act relates to the equipment and appliances which a railway company, engaged in interstate commerce, must provide and not to the imposition thereon of foreign objects by others not connected with the Company and beyond its control. The law so far as it relates to running boards deals solely with the mechanical construction and maintenance of secure running boards. This may mean that it shall be of a safe width, solidly fastened, level, and of material giving fair footing. If more than this, the statute makes the railroad an insurer of its employes, not only against insecure running boards, but against every act of an outsider or trespasser which, without in the least affecting the mechanical structure of a perfectly secure running board, makes its use dangerous by placing upon it some obstruction like a chunk of coal, wood, or anything upon which a brakeman may trip, unbeknown to the railroad or its servants, or under such condition that failure to know thereof cannot impute negligence. We do not believe this was intended by the lawmakers."

II. Cases Construing or Applying Boiler Inspection Act Are Completely Inapplicable Here.

Petitioner admittedly "relies mainly" on *Lilly v. Grand Trunk Western R. Co.*, 317 US 481 (1943) and *Minehart v. Southern Pacific Co.*, 136 Cal. App. 2d 486, 288 P.2d 999 (1955) (Pet. 4). Those cases (discussed at pp. 14-16 and note 8 below) involved not the Safety Appliance Act, but an entirely different statute, the Boiler Inspection Act.[5]

The Boiler Inspection Act (45 USCA § 23, Pet. App. C, ix) uses essentially different methods and requirements from those of the Safety Appliance Act (45 USCA §§ 4 and 11, Pet. App. B, vii) in promoting the common objective of railroad safety. Instead of requiring that all railroad cars be equipped or provided with particularly specified safety appliances, the Boiler Inspection Act confines itself to locomotives and tenders, and, as to them, imposes far broader requirements, not only of providing equipment, but of maintenance, inspection and testing. It specifies no safety appliances, but requires that any locomotive in use, "its boiler, tender, and all parts and appurtenances thereof" be "in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary

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5. The statutes and sections commonly referred to as the "Safety Appliance Acts" are listed in the Historical Note to 45 USCA § 1; those commonly referred to as the "Boiler Inspection Acts" are listed in the Historical Note to 45 USCA § 22. There is written precedent for erroneous confusion of the two. In *Lilly v. Grand Trunk Western R. Co.*, 317 US 481, 484, 490, (1943), both petitioner's counsel and the trial judge below had referred to the Boiler Inspection Act as the "Safety Appliance Act" and had to be corrected by Mr. Justice Murphy's opinion. In *Minehart v. Southern Pacific Co.*, 136 Cal. App. 2d 486, 288 P2d 999 (1955), the opinion mistakenly refers to 45 USCA § 23 as the Safety Appliance Act instead of the Boiler Inspection Act (despite the opinion's citation of *Lilly* above and of *Compton v. Southern Pacific Co.*, 70 Cal. App. 2d 267, 268, 161 P2d 40, both of which use the correct nomenclature).

peril to life or limb." Succeeding sections of the Boiler Inspection Act, 45 USCA §§ 24-34, set up an elaborate system of district locomotive inspectors to work under a national director and assistant directors of locomotive inspection, and give power to the ICC, after hearing, to approve rules and instructions, for the inspection of locomotive equipment, obligatory upon the carrier. The Boiler Inspection Act requirement that a locomotive be "in proper condition and safe to operate" presumably would *include* the providing of appropriate safety appliances, but obviously its scope is much broader and its main objective quite different—to require that all parts of locomotives be properly maintained, inspected and tested. The requirement is not just of safety in equipment, but also of safety in day-to-day operation.

Lilly v. Grand Trunk Western R. Co., 317 US 481 (1943), well illustrates the broader scope of the Boiler Inspection Act. No safety appliance whatsoever was involved in that case. The plaintiff brakeman fell when he slipped on ice on the top of a locomotive tender. This Court held that under those circumstances, use of the tender had violated the Boiler Inspection Act because the tender was not "in proper condition and safe to operate" as required by that Act, and was in direct violation of ICC Rule 153, promulgated under the Boiler Inspection Act, requiring that "top of tender behind fuel space shall be kept clean, and means provided to carry off waste water."[6]

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6. As quoted on 317 US 486, note 5, ICC Rule 153 provided:

"153. Feed water tanks.—(a) Tanks shall be maintained free from leaks, and in safe and suitable condition for service. Suitable screens must be provided for tank wells or tank hose.

(b) Not less frequently than once each month the interior of the tank shall be inspected, and cleaned if necessary.

(c) Top of tender behind fuel space shall be kept clean, and means provided to carry off waste water. Suitable covers shall be provided for filling holes."

This rule, as amended (without change in the quoted language), is now codified as 49 CFR § 91.153.

Petitioner's attempt to apply the *Lilly* case to the question of proper interpretation of the Safety Appliance Act in the case at bar is completely untenable. Petitioner contends (Pet. 8-9) that the reference to "the Act" in the following quotation from *Lilly* (317 US at 487) was a reference to the Safety Appliance Act as well as the Boiler Inspection Act:

> "From various cases denying recovery under the Act respondent attempts to extract a general rule that the Act covers only defects in construction or mechanical operation and affords no protection against the presence of dangerous objects or foreign matter. But there is no warrant in the language of the Act for construing it so narrowly. * * *"

The remainder of the paragraph in the *Lilly* opinion, (cut off in the middle by petitioner's foregoing quotation) shows beyond question that "the Act" refers *only* to the Boiler Inspection Act:

> "* * * or for denying the Commission power to remedy shortcomings, other than purely mechanical defects, which may make operation unsafe. The Act without limitation speaks of equipment 'in proper condition and safe to operate * * * without unnecessary peril to life or limb.'[7] Conditions other than mechanical imperfections can plainly render equipment unsafe to operate without unnecessary peril to life or limb. Whatever else may be said about the cases relied upon by respondent, they are sufficiently distinguishable in that they either did not involve or did not consider Rule 153 or any comparable regulation." (317 US at 488)

Petitioner argues that because the *Ford*, *Benson* and *Slater* cases (cited in the quotation from this Court's

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[7] Language found *only* in the Boiler Inspection Act (Pet., App. C, ix), *not* in the Safety Appliance Act (Pet., App. B, vii).

Scarlett decision, pp. 7-8 above), were included in the cases mentioned in the above quotation from the *Lilly* opinion, as relied upon by the respondent there, those three cases and the *Scarlett* case itself were somehow repudiated or modified by *Lilly* (Pet. 8,9). But the *Lilly* opinion expressly refrains from infringing upon those cases in any way, saying only that they are "sufficiently distinguishable in that they either did not involve or did not consider Rule 153 or any comparable regulation." In other words, this Court, in the *Lilly* case, was considering those earlier cases *only* in so far as they touched and concerned the problem then before the Court, the proper construction and application of the Boiler Inspection Act. There was no occasion for the Court to pass or comment upon the construction or application of the Safety Appliance Act in those earlier cases, and the Court did not do so. The Third Circuit so held in *Raudenbush v. Baltimore & Ohio R. Co.*, 160 F2d 363 (1947) (cited in the opinion below in the case at bar, Pet., App. A, iv), where the plaintiff similarly relied upon the *Lilly* case in contending that snow or ice on the sill step of a gondola car gave rise to a violation of Safety Appliance Acts. The court, after stating the *Lilly* case, declared (160 F2d at 366):

> "Because of the language of the rule involved in the cited case [*Lilly*] and of the reliance upon such language and of the absence of such language in the present case, we do not think the cited case dispositive of our present question."[8]

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8. *Minchart v. Southern Pacific Co.*, 136 Cal. App. 2d 489, 288 P2d 999 (1955), relied upon by petitioner (Pet. 4), was also cast under the Boiler Inspection Act (45 USCA § 23), even though the opinion erroneously refers to the statute before it as the "U.S. Appliance Act" (see note 5 above). The *Minchart* case simply held that evidence of grease and oil on the ladder of a locomotive was sufficient to submit to the jury the question of whether the locomotive was in improper or unsafe condition in violation of the Boiler Inspection Act, citing the *Lilly* case. No question under the statute properly known as the Safety Appliance Act was raised.

The contrast between the two statutes, the Safety Appliance Act, 45 USCA §§ 4 and 11, and the Boiler Inspection Act, 45 USCA § 23, is further shown by the regulations promulgated by the ICC under each statute.[9] ICC Rule 153 (quoted at note 6 above as it appeared in the *Lilly* case) is typical of the ICC regulations under the Boiler Inspection Act, codified as Part 91, "Locomotive Inspection", Title 49, Code of Federal Regulations, in that it deals with maintenance, inspection and cleaning of a portion of a locomotive. This body of regulations is divided into the various principal parts and appurtenances of locomotives, and then into the requirements of construction, equipment, maintenance, repair, cleaning, inspection and testing applicable to the particular locomotive part.

ICC regulations under the Safety Appliance Act, on the other hand, are codified as Part 131, "United States Safety Appliance Standards (Railroad)", Title 49 of the Code of Federal Regulations, which is divided first into the various kinds of railroad cars, then subdivided into appliances (e.g. hand brakes, running boards, sill steps, various handholds, uncoupling levers), and further subdivided into the number, dimensions, location and manner of application required for the particular appliance on the particular type of car.[10]

9. Cases relied upon by petitioner recognize or hold that long administrative practice of the ICC should be given great weight in interpreting the Safety Appliance Act. *Baltimore & O. R. Co. v. Jackson*, 353 US 325, 330-331 (1957); *Shields v. Atlantic Coast Line R. Co.*, 350 US 318, 321-322 (1956); *Knight v. Chicago & N.W. Ry. Co.*, 3 Ill. App. 2d 502, 123 NE 2d 128, 132 (1954). All these cases cite *Davis v. Manco*, 266 US 401, 405 (1925), on this point.

10. 45 USCA § 12 provides in part:

"The number, dimensions, location, and manner of application of the appliances provided for by sections 4 and 11 of this title as designated by the Interstate Commerce Commission shall remain as the standards of equipment to be used

Unlike the regulations under the Boiler Inspection Act, none of these Safety Appliance standards deals with inspection, maintenance or day-to-day operations of any sort. Indeed, 49 CFR § 131.1(e)(4)(iii) of the Safety Appliance Regulations illustrates that the ICC expressly avoids dealing with cleaning or maintenance in the Safety Appliance Regulations, for the last sentence of that regulation, which deals with the manner of application of running boards on box cars, provides:

> "When made of material other than wood the tread surface shall be of anti-skid design and constructed with sufficient open space to permit the elimination of snow and ice from the tread surface."

It does not say that the tread surface *shall* be kept clear of snow and ice, but only that the *structure* of the appliance shall be such as to *permit* its proper maintenance. *Nowhere* does any ICC regulation under the Safety Appliance Act require the cleaning or removal of foreign matter (such as snow, ice, grease or oil) from any piece of equipment (such as a grab iron).

III. The Distinction Between the Two Acts Is Fair and Reasonable and Consistent With the Practicalities of Railroad Operations.

Petitioner (Pet. 10-11) criticizes the statement of the opinion of the Court of Appeals below that Congress has seen fit to require under the Boiler Inspection Act that locomotives be "in proper condition and safe to operate," but to impose a different requirement under the Safety Appli-

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on all cars subject to the provisions of sections 11-16 of this title; unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to the penalty as failure to comply with any requirement of sections 11-16 of this title."

ance Act—that cars have secure grab irons, and that this distinction in the requirements of the two Acts appears to be reasonable, for the following reasons (which petitioner quotes from the Court of Appeals' opinion, Pet. 11):

> "Under practically all circumstances a locomotive is in the personal charge and custody of the railroad, and an opportunity is provided for the maintenance of it in a safe condition. This may not be true in the case of a car which is used on many lines by many different railroads, and which may have been in the custody of consignees. It would appear to be unreasonable under such circumstances that the railroad should at all times and under all circumstances be under a positive duty to maintain its cars in a safe condition."

Petitioner then purports to answer the Court of Appeals' view of the reasonableness of the distinction between the two Acts by citing cases which, in so far as applicable here, simply hold that a railroad has a duty of *care* (that is, of non-negligence) to inspect foreign cars for defects that may expose employees to danger. *Baltimore & Potomac R. Co. v. Mackey*, 157 US 72, 88 (1895); *Texas & Pacific R. Co. v. Archibald*, 170 US 665, 669 (1898); *Lewis v. Union Pacific R. Co.*, 127 Cal. App. 2d 280, 283, 273 P2d 706 (1954). The undisputed doctrine of those cases is expressly recognized by the opinion below, which continues (immediately after the forgoing portion quoted by petitioner) as follows (Pet. App. A, v):

> "Of course, under the general provisions of the Federal Employers Liability Act, the railroad may be held responsible for negligence in the maintenance of its cars; but the question of whether in this case the railroad was or was not negligent has been determined by the jury in favor of the railroad, and no appeal has been taken from such finding."

Where, as in the present case, the railroad has been found by an unchallenged jury verdict to be free of any relevant negligence, the distinction stated by the Court of Appeals below is perfectly sound: in those circumstances it would be unreasonable to impose *absolute* liability for the presence of oil or grease on the ladder of a box car. A locomotive is under the constant control and supervision of the employees of its operating carrier, whether on the line, or in the yard or roundhouse. An ordinary freight car, on the other hand, may be hauled by several different railroads even in a single journey, and may stand on the premises of a consignee for long periods of time.

The soundness of the Court of Appeals' view that it would be unreasonable to impose a universal, absolute duty upon railroad carriers to maintain ordinary freight cars in perfectly safe condition is well illustrated by some of the factual situations portrayed in petitioner's offer of proof (R. 20-23) and in some of the cases heretofore discussed.

In petitioner's offer of proof to the district court, petitioner's counsel stated (R. 22) that the car involved in this case had been spotted on the industry track for 30odd hours before petitioner was hurt. He added, "And at the place it was spotted it was not an oil refinery, it was a flour mill" (R. 22). But suppose it *had* been an oil refinery, and the presence of oil on the ladder had been caused by oil refinery employees' acts for which the railroad could not be charged with responsibility or notice? Railroad liability on these circumstances would be unreasonable and yet would result under the rule now contended for by petitioner.

In *Shields v. Atlantic Coast Line R. Co.*, 350 U.S. [illegible] (1955), the plaintiff and petitioner was an independent contractor in the business of unloading gasoline and for that purpose was standing on a dome running board on top of

tank car which was to be unloaded when the dome running board broke and petitioner fell and was injured. The dome running board was held a running board within the meaning of 45 USCA § 11 (Pet. App. B, vii), and the petitioner was held entitled to recover for injuries due to its breakage even though he was not an employee of the defendant railroad. Under the rule contended for by petitioner in this case, one non-railroad employee might place a foreign substance or object on a safety appliance of a car; another non-employee could immediately afterwards be injured thereby and the railroad would be absolutely liable—clearly an unreasonable result.

In *Raudenbush v. Baltimore & O. R. Co.*, 160 F2d 363 (3 Cir. 1947), the Third Circuit held that snow fall on a sill step of a gondola car did not make the sill step not "secure", in violation of the Safety Appliance Act, distinguishing *Lilly v. Grand Trunk Western R. Co.*, 317 US 481, as dealing with a different statute, the Boiler Inspection Act (page 16 above). But *Raudenbush* goes further; it holds that as a matter of law there was insufficient evidence to hold the defendant railroad there guilty of *negligence* in failing to remove any ice or snow from the sill step, for the reason that there were some 930 cars in the freight yard and the snow fall had ceased only an hour or an hour and a half before the accident. Regardless of the rule as to locomotives, which are practically always attended by employees while in active service, it would obviously be unreasonable to hold that all 930 of those freight cars violated the Safety Appliance Act immediately following the snow fall.

The answer to petitioner's final rhetorical question (Pet. 12), Why should it be unduly burdensome on said railroad to inspect said cars for the presence of oil or grease on the grabirons as well as for worn out bolts or nuts on grab

irons which may cause it to break when a man steps on it" is that the railroad carrier *does* have a duty to *use due care* in making such inspection, and that the jury has found that respondent *fulfilled* that duty in so far as it had any connection with petitioner's injury. The difference between oil or grease on the grab iron, on the one hand, and worn out bolts or nuts on the grab iron, on the other hand, is essentially this: Unless the railroad has been *negligent* in failing to inspect for and remove the oil or grease, it is probable that the oil or grease resulted from conditions beyond any possible control by the railroad. Worn out bolts or nuts on grab irons, on the other hand, *gradually* deteriorate *through time* and can be controlled by the railroad through a systematic program of periodic repair, replacement and renewal. (See also pp. 11-12 and note 4 above.)

CONCLUSION

The interpretation by the Court of Appeals below of the Safety Appliance Act provisions invoked by petitioner, 45 USCA §§ 4, 11, is reasonable, sound and proper and in accordance with all relevant decisions, including decisions of this Court. The strict requirements of the Boiler Inspection Act, 45 USCA § 23, for the maintenance, inspection and testing of locomotives and tenders do not and should not apply to ordinary freight cars.

WHEREFORE, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Dated: San Francisco, California, April 24, 1961.

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